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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

LOUIS EVANGELISTA, SR. and CLAUDE EVANGELISTA,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can an employer/defendant be convicted of a felony under 26 U.S.C. § 7202 for failure to make timely payment of employment taxes where the defendant fully and truthfully accounts for and reports all taxes that are due to be paid, since the plain language of Section 7202 requires proof of a willful failure to truthfully account *and* willful failure to pay in order to sustain a conviction?

2. Should a criminal tax conviction be sustained where the jury was not specifically instructed as to the components of the defense, including the distinction between deferral and evasion of payment of taxes, good faith belief in the lawfulness of the taxpayer's conduct, and reliance upon the professional advice of an accountant?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
PETITION FOR A WRIT OF CERTIORARI	1
OPINION BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	5
I. THIS COURT SHOULD GRANT THE PETITION IN ORDER TO RESOLVE A CONFLICT IN THE CIRCUITS REGARDING THE INTERPRETATION OF 26 U.S.C. § 7202	5
A. The Conflict in the Circuits	6
B. The Court of Appeals's Flawed Interpretation of the Plain Language of Section 7202	7
C. The Court of Appeals's Interpretation Is Contrary to the Policies and Legislative History of Section 7202	9

PAGE

D. The Court of Appeals Failed To Appreciate The Penal Nature of Section 7202 11

E. The Court of Appeals Erroneously Failed To Consider The Application of the Doctrine of Lenity In Interpreting Section 7202..... 13

II. THIS COURT SHOULD GRANT THE PETITION IN ORDER TO RESOLVE A CONFLICT IN THE CIRCUITS RESPECTING THE INSTRUCTIONS REGARDING THE DEFENSES IN THIS CASE 15

CONCLUSION..... 17

APPENDIX

ORDER OF THE COURT OF APPEALS A1a

JUDGMENT OF THE DISTRICT COURT AS TO CLAUDE EVANGELISTA..... A25a

JUDGMENT OF THE DISTRICT COURT AS TO LOUIS EVANGELISTA, SR. A30a

ORDER DENYING PETITION FOR REHEARING... A35a

TABLE OF AUTHORITIES

Cases	PAGE
Bifulco v. United States, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980)	14
Cheek v. United States, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991)	16
Edwards v. United States, 375 F.2d 862 (9th Cir. 1967)	15
Hughey v. United States, 495 U.S. 411, 110 S.Ct. 1979, 109 L.Ed.2d 408 (1990)	14
Moskal v. United States, 498 U.S. 103, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990)	14
Ratzlaf v. United States, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994)	14
Sansone v. United States, 380 U.S. 343, 85 S.Ct. 1004, 13 L.Ed.2d 882 (1965)	15
Spies v. United States, 317 U.S. 492, 63 S.Ct. 364, 87 L.Ed. 418 (1943)	9
United States v. Bass, 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971)	14
United States v. Brennick, 908 F.Supp. 1004 (D.Mass. 1995)	*passim*
United States v. Duncan, 850 F.2d 1104 (6th Cir. 1988), *aff'd*, 881 F.2d 1077 (1989), *cert. denied*, 110 S.Ct. 732 (1990)	16
United States v. Morris, 20 F.3d 1111, 1117-1118 (11th Cir. 1994)	16

PAGE

United States v. Poll, 521 F.2d 329 (9th Cir. 1975) ... 6

United States v. Wiltberger, 5 Wheat. (18 U.S.) 35, 5 L.Ed. 76 (1820) 14

Wilson v. United States, 250 F.2d 312 (9th Cir. 1957) 6, 10

Statutes:

18 U.S.C. § 371 3

18 U.S.C. § 3231 2

26 U.S.C. § 7201 ..... 2, 3

26 U.S.C. § 7202 ..... *passim*

26 U.S.C. § 7203 15

26 U.S.C. § 7215 10

26 U.S.C. § 7512 10

28 U.S.C. § 1254(1) 2

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Louis Evangelista, Sr. and Claude Evangelista petition for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Second Circuit ("the Court of Appeals") affirming the Judgment of conviction entered in the United States District Court for the Eastern District of New York.

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a) is reported at 122 F.3d 112 (2d Cir. 1997).

JURISDICTION

The Judgment of the Court of Appeals was entered on August 13, 1997. A timely petition for rehearing was filed on August 27, 1997. The petition for rehearing was denied by an order of the Court of Appeals dated September 25, 1997 (Pet. App. 35a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 13 of the Rules of this Court. Jurisdiction of the District Court was based on 18 U.S.C. § 3231.

STATUTORY PROVISIONS INVOLVED

26 U.S.C. § 7202 provides, in pertinent part, as follows:

> "Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

26 U.S.C. § 7201 provides, in pertinent part, as follows:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution."

STATEMENT

This case raises important and unsettled issues involving the proper construction and application of Federal laws providing for criminal punishment in cases involving an employer's failure to make timely payment to the IRS of payroll taxes. The following is a brief summary of the factual background of this case.

1. Petitioner Louis Evangelista, Sr. ("Louis") is businessman engaged in the real estate development and management, construction, and related fields. Petitioner Claude Evangelista ("Claude") is Louis's son and works with his father in these businesses.

2. Petitioners's businesses were initially successful and consistently reported and paid large amounts of income and payroll taxes. However, Petitioners's businesses suffered severe financial reverses in the late 1980's and early 1990's as a result of both the general downturn in the real estate market and a large-scale embezzlement perpetrated by one of Louis's brothers, with the assistance of an employee. Petitioners's businesses thereafter fell behind in the payment of employment taxes, *i.e.*, withholding taxes and FICA contributions. Nevertheless, Petitioners's businesses consistently withheld the required taxes from their employees' gross pay, and truthfully accounted for the withheld taxes by filing accurate quarterly tax returns (Form 941) with the IRS.

3. An indictment was filed against Petitioners (and two other defendants) in the United States District Court for the Eastern District of New York on May 10, 1995. The indictment charged Petitioners with, (1) one count of conspiracy to defraud the United States by impeding the IRS in the collection of income and employment taxes, in violation of 18 U.S.C. § 371; (2) twenty-one counts of willful failure to pay employment taxes, in violation of 26 U.S.C. § 7202; (3) and one count (against Louis only) of willful failure to pay income taxes, in violation of 26 U.S.C. § 7201.

4. Trial commenced on February 1, 1996. Petitioners's principal defense at trial was that they did not intend to evade and defeat the payment of taxes, but rather merely intended to defer payment until such time as the financial condition of their businesses improved. To substantiate this defense, Petitioners pointed to the fact that their businesses consistently filed accurate tax returns reporting the correct amount of the tax liabilities, something they would not have done if their intent had been to evade and defeat—as opposed to merely defer—the payment of the taxes.

5. The District Court held, and charged the jury, that Petitioners could be convicted under 26 U.S.C. § 7202 if they willfully failed to pay the employment taxes, even if their businesses truthfully accounted for the taxes by filing accurate quarterly tax returns.

6. The District Court also refused to instruct the jury as to the components of the defense theory of the case, *i.e.*, (1) that an intent to defer the payment of taxes is not the same as an intent to evade and defeat the payment of taxes, and that defendants could not be convicted of the offenses charged if they merely intended to delay, as opposed to evade, the payment of taxes; (2) that Petitioners could not be convicted of criminal tax offenses if they subjectively believed that it was lawful for them to defer the payment of taxes while carrying on their businesses and paying other expenses; and (3) that Petitioners could not be guilty of criminal tax offenses if they relied on the advice of their accountant that they could continue paying other expenses while deferring payment of the tax liabilities.

7. The jury returned guilty verdicts against Petitioners on all counts on February 28, 1996. On October 28, 1996, the District Court sentenced Louis to a term of fifty-one months' incarceration, to be followed by a three-year term of supervised release, and sentenced Claude to a term of forty-six months' incarceration, to be followed by a three-year term of

supervised release. The Court of Appeals affirmed Petitioners's conviction in a published opinion entered on August 13, 1997.

REASONS FOR GRANTING THE PETITION

This Court should grant the Petition and review this case because, (1) the Court of Appeals interpreted a criminal tax statute, 26 U.S.C. § 7202, in a manner that is inconsistent with the decisions of another Court of Appeals interpreting said statute; (2) the proper interpretation of 26 U.S.C. § 7202 raises an important federal question that this Court has not decided but ought to do so, since Section 7202 defines the potential exposure of employers to criminal punishment in cases involving the failure to make timely payment of employment taxes; (3) the Court of Appeals's affirmance of the District Court's refusal to charge the jury on the components of the defense theory is in conflict with decisions of other Courts of Appeals and of this Court.

I. THIS COURT SHOULD GRANT THE PETITION IN ORDER TO RESOLVE A CONFLICT IN THE CIRCUITS REGARDING THE INTERPRETATION OF 26 U.S.C. § 7202.

One of the two principal contentions raised by Petitioners in the District Court and the Court of Appeals was that there can be no valid conviction under 26 U.S.C. § 7202 where the defendant fully and truthfully accounts for and reports all taxes that are due to be paid. Section 7202 provides as follows:

> "Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony . . ."

The government conceded that Petitioners's companies truthfully accounted for the applicable employment taxes by filing accurate quarterly payroll tax returns. The government's only claim was that Petitioners's companies failed to "pay over" such taxes. However, since the plain language of Section 7202 clearly provides that an offense is only committed if the defendant failed to "truthfully account for *and* pay over" the taxes, it is clear that Petitioners were not properly convicted of violating Section 7202.

Notwithstanding the plain language of the statute, the District Court and the Court of Appeals held that a defendant can be convicted under Section 7202 if the defendant *either* fails to truthfully account for *or* pay over employment taxes. (122 F.3d at 122, Pet. App. 23a). The ruling of the Court below affirming Petitioners's convictions under Section 7202 does violence to the plain language of the statute and is in conflict with decisions of another Court of Appeals on the issue, and should therefore be reviewed and reversed by this Court.

A. The Conflict in the Circuits

The decision of the Court of Appeals in this case is in conflict with the interpretation of Section 7202 adopted by the only other Court of Appeals that has yet addressed the issue. In *United States v. Poll*, 521 F.2d 329, 333 (9th Cir. 1975), the Ninth Circuit followed its earlier decision in *Wilson v. United States*, 250 F.2d 312, 318 (9th Cir. 1957) (interpreting the predecessor statute of Section 7202) and held that in order to make out a violation of Section 7202 "[b]oth the failure to truthfully account for *and* to pay over must be willful." Since the government concededly failed to prove both of these elements as to Petitioners, the Ninth Circuit's construction of Section 7202 compels the conclusion that Petitioners's convictions under that statute are legally untenable.

In affirming Petitioners's convictions, the Court of Appeals expressly rejected the Ninth Circuit's interpretation of Section 7202. (122 F.3d at 121, Pet. App. 22a). Thus, this case

presents a clear-cut conflict in the Circuits regarding the proper construction of Section 7202.

B. The Court of Appeals's Flawed Interpretation Of the Plain Language of Section 7202

In rejecting the Ninth Circuit's interpretation of Section 7202, and instead holding that a defendant can be convicted under Section 7202 based upon the mere failure to pay over the withholding taxes, the Court below relied on a District Court decision, *United States v. Brennick*, 908 F.Supp. 1004 (D.Mass. 1995). The District Court's reasoning in *Brennick*, which the Court below adopted, is unpersuasive, and is based upon a fundamental misinterpretation of the language of Section 7202.

The *Brennick* decision, as well as the decision of the Court below, found it anomalous that Congress would have intended for the statute to penalize one who merely fails to collect trust fund taxes, but not one who fails to pay them over but truthfully accounts for them by filing accurate tax returns. 908 F.Supp. at 1017. However, this interpretation is at odds with the plain language of the statute.

There is a more plausible reading of the disputed phrase in Section 7202, other than the one adopted by the Court of Appeals and *Brennick*, which entirely eliminates the result which the Court of Appeals and *Brennick* found objectionable. The Court of Appeals and *Brennick* parsed the contested phrase in the statute as follows (brackets indicating the separation):

> ". . . willfully fails [to collect] or [truthfully account for and pay over] such tax . . ."

But a different way to bracket the same phrase would be as follows:

> ". . . willfully fails [to collect or truthfully account for] and [pay over] such tax . . ."

This alternative interpretation leads to the creation of the following two offenses:

1) the willful failure to collect and pay over such tax; and

2) the willful failure to truthfully account for and pay over such tax.

This alternative interpretation makes the gravamen of each offense the willful failure to pay, which is not only consistent the primary concern of the tax code, but also makes it clear that such failure to pay will subject an employer to felony prosecution under Section 7202 *only if the failure to pay is accompanied either by the failure to collect or the failure to truthfully account*. Moreover, this interpretation is entirely consistent with the language of the provision, and it is actually a more natural reading than the one followed by the Court of Appeals, because it joins the terms "such tax" and "collection", whereas the sharp disjunctive "or" adopted by the reading of the Court of Appeals and *Brennick* separates "collection" from "such taxes", leading to a very awkward and confusing construction of the statute (*i.e.*, begging the question, collection of what?).

In addition, this reading of the statute is preferable to that adopted by the Court of Appeals and *Brennick* because it links together the acts of "collection" and "accounting for" the payroll taxes, acts which are logically connected under the statutory scheme of the Internal Revenue Code. Under the Code, an employee is relieved of liability for the taxes once the employer has withheld the taxes from the employee's gross pay (*i.e.*, collection), IRC § 31, and the employer notifies the IRS of this assumption of liability by reporting the taxes on quarterly tax returns (*i.e.*, accounting). It makes sense that only an employer who fails to do either of these acts, *and* fails to pay over the taxes to the IRS, should be subject to felony prosecution.

Most important, this interpretation eliminates the consequence that both the Court of Appeals and *Brennick* found unacceptable. The seeming inequity in the treatment of the failure to pay and the failure to collect the taxes disappears. Whether the taxpayer fails to collect, or fails to truthfully account, the taxpayer will be treated the same, depending upon whether the taxpayer willfully failed to pay. Under this reading, one who merely fails to collect will not be treated more harshly than one who collects and truthfully accounts, but does not pay; neither taxpayer will be subject to felony prosecution under Section 7202.

Finally, by converting the conjunctive "and" into the disjunctive "or", the interpretation of Section 7202 by the Court of Appeals and *Brennick* leads to very anomalous results. Thus, under their reading of the statute, an employer who fails to withhold the taxes from the employee's paycheck, but who nevertheless files accurate tax returns and makes full payment of the taxes to the IRS, would still be liable to felony prosecution under Section 7202. Similarly, an employer who withholds the taxes and makes full payment to the IRS, but fails to file a quarterly tax return, would also be subject to felony prosecution. It is inconceivable that Congress could have intended such results.

C. The Court of Appeals's Interpretation is Contrary to The Policies and Legislative History of Section 7202

The foregoing interpretation of Section 7202 is also in harmony with general principles governing criminal tax statutes. As a general rule, the tax code does not subject taxpayers who merely fail to make timely payment of taxes—unaccompanied by other affirmative conduct such as the failure to collect or the failure to truthfully account—to felony treatment. As this Court pointed out in *Spies v. United States*, 317 U.S. 492, 498, 63 S.Ct. 364, 367, 87 L.Ed. 418 (1943), a prosecution for the mere non-payment of taxes where the defendant truthfully

accounted for the tax by filing accurate tax returns is akin to imprisonment for debt, a concept for which the courts have shown a "traditional aversion". It is entirely consistent with that tradition for Congress to have crafted the language of Section 7202 to place mere non-payment cases outside of the realm of felony treatment, and instead to require either the combination of failure of collection *and* failure of payment, or the combination of failure to account *and* failure of payment, for a taxpayer to be liable to felony prosecution under Section 7202.

Notably, there is a misdemeanor provision, 26 U.S.C. § 7215, that does punish the mere failure to pay over payroll taxes. Specifically, Section 7215 makes it a misdemeanor for any person to fail to comply with 26 U.S.C. § 7512, and Section 7512(a)(1) expressly applies to anyone who "fails to collect, truthfully account for, *or* pay over such tax." The language of that statute is clearly and deliberately different from the language of Section 7202; unlike Section 7202, Sections 7215 and 7512 use the disjunctive "or" rather than the conjunctive "and" when referring to the failure to "collect, truthfully account for, or pay over such tax." Unlike Section 7202, the language of Sections 7215 and 7512 clearly defines the failure to collect, the failure to truthfully account for, and the failure to pay over such taxes as *three* separate misdemeanor offenses.

The legislative history of Section 7202 also supports the conclusion that the decision of the Court below is in error, and that the Ninth Circuit's conflicting interpretation of Section 7202 is the correct one. As noted, the Ninth Circuit held in *Wilson v. United States*, 250 F.2d at 318, that the predecessor statute of Section 7202 did not apply to the mere failure to pay over trust fund taxes. The fact that Congress thereafter enacted Section 7202 employing the same language the Court construed in *Wilson* confirms that Congress did not intend for the felony statute, Section 7202, to reach the mere failure to pay over trust fund taxes, where the defendant has

truthfully accounted for such taxes by filing accurate tax returns.

D. The Court of Appeals Failed To Appreciate The Penal Nature of Section 7202

The fundamental error in the interpretation of Section 7202 adopted both by the Court of Appeals and *Brennick* is that those decisions treat Section 7202 as a statute that defines the obligations of a taxpayer. However, Section 7202 is a *penal* statute and its purpose is therefore to define the elements that the government must prove in order to secure a felony conviction, not to impose regulatory requirements upon employers. And, most important, as discussed below, since Section 7202 is a penal statute, any ambiguity in its language must be construed in a manner most favorable to the defendant under traditional principles of the doctrine of lenity.

The fact that there is a defect in the Court of Appeals's reading of Section 7202 can be illustrated by highlighting two contradictory assertions made in the course of a few pages of the Court's opinion. On the one hand, the Court of Appeals (as well as the District Court in *Brennick*) states that "[T]he phrase 'truthfully account for and pay over' is unambiguously conjunctive" (122 F.3d at 121, Pet. App. 21a, quoting *Brennick*). On the other hand, the Court of Appeals states in the conclusion of its opinion that "the Government satisfies the requirements for conviction under 7202 when it proves beyond a reasonable doubt that the defendant willfully failed *either* to 'truthfully account for' *or* to 'pay over' the required trust fund taxes." (122 F.3d at 122, Pet. App. 23a (emphasis in original)). The question is, how did an unambiguous conjunctive, "and", one page later turn into an obvious disjunctive, "either/or"?

The answer is that the Court of Appeals was interpreting Section 7202 from two different perspectives. In the first context, it was interpreting the statute as establishing *what taxpayers are required to do* (account for and pay tax); in the

second context, it was interpreting the phrase in terms of *what the government must prove to establish an offense*. Both the Court below and *Brennick* interpreted Section 7202 as a statute that defines the obligations of taxpayers. That perspective in manifestly incorrect. Section 7202 is a penal statute and it is contained in Chapter 75 of the Internal Revenue Code, entitled "Crimes, Other Offenses, and Forfeitures." Chapter 75—of which Section 7202 is a part—specifies what behavior is criminal under the tax laws. As in any criminal code, it sets out the elements which the government must prove to establish a crime. Section 7202, a penal statute, is not intended to define the obligations of taxpayers; it is intended to define the elements of a criminal offense.

The reading of Section 7202 adopted by the Court below and *Brennick* would make sense only if section 7202 were a statute that establishes what taxpayers are required to do. Both courts read section 7202 this way when they conclude that, "therefore, 'any intentional failure to complete the required task (to truthfully account for and pay over the tax) constitutes a crime.' " (122 F.3d at 121, Pet. App. 21a). However, if section 7202 is read, not as imposing requirements on employers, but as specifying the burden that the government must prove to obtain a felony conviction, then the "unambiguous conjunctive" in the statute must remain a conjunctive, and that means that the burden to prove both elements—the failure to truthfully account *and* the failure to pay—remains on the government.

The interpretation of section 7202 by the Court below and *Brennick* as setting forth the requirements imposed on taxpayers is fundamentally and obviously mistaken, both in terms of the language of the statute and in terms of the structure of Chapter 75 and its place in the overall tax code. Notably, Section 7202 begins, "*Any person required under this title to collect, account for, and pay over any tax imposed by this title* who willfully fails to collect or truthfully account for and pay over such tax . . ." In their interpretations of

Section 7202, neither the Court below nor *Brennick* focused on the highlighted phrase. This introductory phrase refers to the obligations of the taxpayer, obligations that are expressly imposed by *other* provisions of the Internal Revenue Code. It is the *second* phrase, the phrase at issue in this case, that defines what the government must prove in order to secure a conviction. The language of Section 7202 itself recognizes this distinction.

The distinction is further highlighted by the placement of Section 7202 within the Internal Revenue Code. Numerous chapters precede Chapter 75 of the Internal Revenue Code, all of which impose various and extensive requirements on taxpayers. Not all of these requirements have criminal sanctions attached to failures to comply (some have no sanction, others have civil sanctions); and those that do have criminal sanctions vary in nature and severity. Criminal penalties for failures to comply with these requirements (if criminal sanctions are imposed) are defined in Chapter 75, where Section 7202 is found. The key point is that the Court of Appeals was mistaken when it interpreted section 7202 to "require" taxpayers to collect, account for, and pay taxes; Section 7202 defines a criminal offense, it does not "require" taxpayers to do anything. The requirements imposed upon taxpayers are set out elsewhere in the Code, and to be sure, employers are in fact required to do all three acts: collect, account for, and pay over the employment taxes. Section 7202, however, is exclusively limited to identifying which of these three requirements, or which combination of the three requirements, when not complied with, will subject an employer to felony prosecution.

E. The Court of Appeals Erroneously Failed To Consider The Application of the Doctrine of Lenity In Interpreting Section 7202

Since the Court of Appeals and *Brennick* failed to recognize the penal nature of Section 7202, neither decision gave any consideration to the doctrine of lenity in interpreting the

statute. "[L]ongstanding principles of lenity . . . demand resolution of ambiguities in criminal statutes in favor of the defendant." *Hughey v. United States*, 495 U.S. 411, 422, 110 S.Ct. 1979, 1985, 109 L.Ed.2d 408 (1990). When there is more than one possible interpretation, therefore, the interpretation which is less harsh toward the defendant must be selected. Lenity has been a time-honored principle which extends back centuries, originating in England. As Chief Justice Marshall declared: "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself". *United States v. Wiltberger*, 5 Wheat. (18 U.S.) 35, 43, 5 L.Ed. 76 (1820). In a long and unbroken line of precedent, this Court has recognized the validity and application of this principle. *See, e.g., Moskal v. United States*, 498 U.S. 103, 108, 111 S.Ct. 461, 465, 112 L.Ed.2d 449 (1990); *Bifulco v. United States*, 447 U.S. 381, 387, 100 S.Ct. 2247, 2252, 65 L.Ed.2d 205 (1980); *United States v. Bass*, 404 U.S. 336, 347, 92 S.Ct. 515, 522, 30 L.Ed.2d 488 (1971); *Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655, 662, 126 L.Ed.2d 615 (1994).

Under any view, there can be no question that the doctrine of lenity applies in this case. In its decision, however, the Court of Appeals failed to consider, mention, or refer to the application of this principle. Since Section 7202 is clearly a penal statute, this failure to construe the language of the statute in light of principles of lenity is not permissible.

It was patently inconsistent with principles of lenity for the Court of Appeals to transform the conjunctive "and" into the disjunctive "either/or." Under long-established principles of statutory construction, it was erroneous for the Courts below to construe Section 7202 to reach the conduct alleged here.

In sum, this case squarely presents an important question involving the interpretation of a federal criminal statute as to which the Courts of Appeals have reached conflicting decisions. In view of the continuing public importance of this

question, this Court should grant the Petition and review and reverse the decision of the Court of Appeals.

II. THIS COURT SHOULD GRANT THE PETITION IN ORDER TO RESOLVE A CONFLICT IN THE CIRCUITS RESPECTING THE INSTRUCTIONS REGARDING THE DEFENSES IN THIS CASE.

This Court should also grant the Petition in order to review the decision of the Court of Appeals insofar as it affirmed Petitioners's convictions notwithstanding the District Court's failure to instruct the jury on several critical components of the defense theory of the case. The decision of the Court of Appeals on this point conflicts with the decisions of other Courts of Appeals and of this Court and presents issues of public importance relating to the enforcement of the criminal tax laws.

Petitioners's principal defense at trial was that their intent was to defer the payment of taxes until the financial condition of their businesses improved, not to evade and defeat taxes. Petitioners requested a specific instruction highlighting the distinction between deferral of payment as opposed to evasion of payment, and the District Court declined to give the instruction. The Court of Appeals recognized that Petitioners raised the issue (122 F.3d at 116, Pet. App. 9a), but failed to address it in its opinion.

The law has long recognized the distinction between the evasion of payment of taxes and the failure to pay taxes when due. *Sansone v. United States*, 380 U.S. 343, 85 S.Ct. 1004, 13 L.Ed.2d 882 (1965); *Edwards v. United States*, 375 F.2d 862, 867 (9th Cir. 1967). In *Sansone*, this Court distinguished between the felony of tax evasion set out under 26 U.S.C. § 7201 and the misdemeanor violation of 26 U.S.C. § 7203—which was not charged here—by pointing out that the misdemeanor statute punishes the willful failure to pay a tax "at the time required by law", while the felony statute punishes

the willful attempt to evade and defeat—as opposed to delay—the payment of the tax. 380 U.S. at 351, 85 S.Ct. at 1010. By failing to charge the jury on the point, the District Court took the issue away from the jury and the Court of Appeals's affirmance was inconsistent with the foregoing authority.

The District Court also declined to give specific instructions on Petitioners's defenses that they could not be liable for willful tax violations if they acted under a subjective good faith belief that their conduct was lawful, and in reliance upon the advice of their accountant. The Court of Appeals held that Petitioners were not entitled to specific instructions on these defenses, and that a general charge on the element of "willfulness" sufficed. (122 F.3d at 116-118, Pet. App. 10a).

The decision of the Court of Appeals is inconsistent with decisions of other Courts of Appeals on this point. A defendant's right in a criminal tax case to a proper instruction on the defense of subjective good faith was established by this Court's decision in *Cheek v. United States*, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991). In conflict with the decision below, the Eleventh Circuit has clearly held that a general instruction on willfulness is not sufficient to present the *Cheek* defense to the jury in a criminal tax case. *United States v. Morris*, 20 F.3d 1111, 1117-1118 (11th Cir. 1994). Similarly, the Sixth Circuit has held that a general willfulness instruction is not sufficient to present the defense of reliance upon the professional advice of an accountant. *United States v. Duncan*, 850 F.2d 1104, 1117-1118 (6th Cir. 1988), *aff'd*, 881 F.2d 1077 (1989), *cert. denied*, 110 S.Ct. 732 (1990).

The fact that the instructions did not adequately convey the theory of the defense is shown by the fact that even the prosecutor was confused about the distinction between evasion and deferral of taxes. At one point in his summation, the prosecutor accused Petitioners of tax evasion by trying to take a "loan" from the IRS. There is a difference between a loan and a theft, and the jury should have been expressly instructed that if all it found was that Petitioners's intent was to *borrow*

the payroll taxes and pay them at a later time, they could not be found guilty of the crimes charged.

In addition to the important issues raised in this case concerning the interpretation of 26 U.S.C. § 7202, this Court should also grant the Petition in order to resolve the foregoing conflicting caselaw addressed to a taxpayer's entitlement to instructions on the theory of defense in a criminal tax case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: December 15, 1997
New York, N.Y.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1478, 1479—August Term 1996

(Argued: January 24, 1997 Decided: August 13, 1997)

Docket Nos. 96-1712 (L), 96-1718 (CON)

UNITED STATES OF AMERICA,

Appellee,

—v.—

PETER EVANGELISTA and ANTHONY EVANGELISTA,

Defendants,

LOUIS EVANGELISTA and CLAUDE EVANGELISTA,

Defendants-Appellants.

Before:

OAKES, KEARSE, and JACOBS,

Circuit Judges.

Appeal by defendants from a judgment of the United States District Court for the Eastern District of New York (Wexler, *J.*) convicting them, after a jury trial, of failure to pay business and personal taxes, and conspiracy to commit fraud by impeding the collection of taxes. On appeal, defendants argue: (1) that the district court erred by refusing to instruct the jury on their theories of defense, including reliance on their accountant's advice; (2) that their conviction for failure to pay withholding taxes was invalid (a) because the government did not prove all of the statutory elements of the crime, and (b) because the district court improperly applied a six-year, instead of a three-year, statute of limitations to the offense; and (3) that an inappropriate comment by the prosecutor during trial unduly prejudiced the jury, was not cured by the district court, and thus tainted their convictions.

Affirmed.

STUART E. ABRAMS, Frankel & Abrams, New York, NY (David S. Hammer, Kostelantz & Fink, LLP, New York, NY, on the brief), *for Defendant-Appellant Louis Evangelista, Sr.*

DAVID I. SCHOEN, New York, NY, *for Defendant-Appellant Claude Evangelista.*

DEMETRI M. JONES, Assistant United States Attorney, Brooklyn, NY (ZACHARY W. CARTER, United States Attorney for the Eastern District of New York, PETER A.

NORLING, Assistant United States Attorney, on the brief), *for Appellee*.

JACOBS, *Circuit Judge*:

Following a 13-day jury trial, Louis Evangelista, Sr. and his son, Claude Evangelista, were convicted in the United States District Court for the Eastern District of New York (Wexler, *J.*) of conspiracy to defraud the United States by impeding the Internal Revenue Service in the collection of income and payroll taxes (in violation of 18 U.S.C. § 371), and failure to pay withholding taxes and FICA contributions to the IRS (in violation of 26 U.S.C. § 7202). Evangelista, Sr., who also was convicted of evading personal income taxes (in violation of 26 U.S.C. § 7201), was sentenced to 51 months in prison and three years of supervised release, and a $1,150 special assessment. Claude Evangelista was sentenced to 46 months in prison and three years of supervised release, and a $450 special assessment. The district court's judgment of conviction and sentence for each defendant was entered on October 30, 1996; both defendants filed timely appeals.[1]

The Evangelistas' separate briefs make essentially identical arguments, Claude Evangelista expressly joining in and adopting all of his father's legal arguments pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure.[2] First, they claim that the district court erred

1 Co-defendant Peter Evangelista pled guilty to evasion of taxes and conspiracy to impede the collection of taxes, and co-defendant Anthony Evangelista was acquitted after trial.

2 References to "Appellant's Brief" indicate the brief of appellant Louis Evangelista, Sr.

by refusing to instruct the jury as to their specific theories of defense, chiefly that their failure to pay taxes resulted from severe financial pressures, and that they did not subjectively believe the nonpayment to be unlawful because they were relying on their accountant's advice that payment could be deferred pending negotiation of a formal payment agreement with the IRS. Second, they argue that their convictions under 26 U.S.C. § 7202 were invalid because that statute requires proof of *both* (a) willful failure to "pay over" payroll taxes, *and* (b) willful failure to "truthfully account for" such taxes, the latter of which the government did not prove beyond a reasonable doubt. Third, the Evangelistas contend that § 7202 is governed by a three-year statute of limitations rather than the six-year period used by the district court, so that many counts of their convictions should have been dismissed. Finally, they argue that the prosecutor's intemperate response to an audible comment by Evangelista, Sr. from the defense table—the prosecutor sarcastically "call[ed] Louis Evangelista to the stand"—prejudiced the jury, was inadequately cured by the court's instruction, and irreparably tainted their convictions.

We affirm the Evangelistas' convictions and sentences in full. We write primarily to address their second argument, regarding the proper construction of, and the requirements for conviction under, 26 U.S.C. § 7202.

BACKGROUND

Louis Evangelista, Sr. and members of his family—including his son Claude, and his brothers (co-defendants) Peter and Anthony—owned and operated several businesses active in real estate development and man-

agement, construction, and equipment rental. These businesses operated through numerous separate entities, one of which, Monaco Management, Inc. ("Monaco"), was formed specifically as a payroll company, and served as the centralized paymaster for the Evangelistas' other enterprises.

The family's real estate holdings, including rental, commercial, and residential properties, as well as unimproved land, expanded dramatically during the early 1980s. By 1986, the properties had an estimated gross fair-market value of $150-200 millon. These holdings were highly leveraged, however, and vulnerable to market fluctuations; many were subject to 100% financing or had been financed through "cross-collateralization," whereby income-producing properties were used as collateral to obtain financing for non-income producing properties. In the real estate market downturn of the late 1980s, the Evangelistas' holdings plummeted in value. By 1991, they had lost virtually all of their properties through foreclosures, and Evangelista, Sr. (according to his accountant's testimony) had a negative net worth of roughly $20-25 million.[3]

According to the Evangelistas, they became unable to pay the payroll withholding taxes and FICA contributions (collectively, "trust funds") owed in respect of their declining businesses. In any event, they stopped paying. Their total liability to the IRS eventually reached more than $1.5 million, most of which was owed by Monaco, the paymaster company. It is apparently uncontested that the Evangelistas (through Monaco) consistently *filed* the

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[3] The Evangelistas claim to have been "doubly rocked" because the market downturn coincided with an alleged embezzlement of several hundred thousand dollars by one of Evangelista, Sr.'s brothers, and an accomplice.

appropriate quarterly tax return forms—"Forms 941"—showing the amount of trust funds that the various family businesses owed to the IRS. But beginning in late 1988, the Evangelistas stopped making the actual payments that the filed forms showed to be due and owing.

In late 1989, the IRS initiated enforcement actions to collect the unpaid trust funds reflected on Monaco's Forms 941. IRS officers filed liens against the Evangelistas' assets and executed levies against the known bank accounts of Monaco and the related businesses. In March 1990, the IRS and Monaco entered into a series of negotiations aimed at resolving the Evangelistas' trust fund delinquency. IRS agents advised one of the Evangelistas' accountants that no formal payment agreement could be reached until Monaco submitted financial statements demonstrating the Evangelistas' alleged inability to pay the funds; in addition, the agents advised the Evangelistas that remaining current on future payments was "always a prerequisite" to such an agreement. But Monaco never submitted the required financial statements; and the parties reached only informal understandings, through which Monaco and/or the Evangelistas voluntarily paid fractional amounts of the past-due trust funds. The IRS therefore continued its collection efforts—seizing the Evangelistas' assets and levying against their business bank accounts—and eventually recovered (as of March 1993) roughly $384,000 of the $1.5 million that had been reported on the Forms 941 but had been unpaid.

In the period 1989 through 1995, the Evangelistas engaged in a series of schemes that (according to the government) were designed to: (a) defeat collection of the trust funds by the IRS, and (b) prevent the IRS from seizing other family and business assets to satisfy the

trust fund obligations. First, the Evangelistas repeatedly commingled personal and corporate funds, and then spent those monies on personal expenses and new businesses, thereby beggaring Monaco and the other entities that owed the trust fund payments. For example, the government showed that numerous checks payable to Evangelista, Sr. in respect of the family's businesses were deposited in personal checking accounts set up in the names of himself and his wife (jointly), and in the names of at least two of their children, including Claude Evangelista. On those personal accounts, hundreds of thousands of dollars in checks were drawn for (*inter alia*) mortgage and other expenses associated with at least two family residences; wedding expenses for Evangelista, Sr.'s two daughters; college tuition for a son and one daughter; and the lease payments and related expenses for a Mercedes Benz driven primarily by Evangelista, Sr.'s wife.

The Evangelistas frustrated seizure of other family assets by transferring ownership of those assets from family members who were personally liable for the overdue trust funds (chiefly Evangelista, Sr.) to those who were not. For example, title to Evangelista, Sr.'s personal residence was transferred to two of his children (jointly), and his $1 million partnership interest in one real estate enterprise was assigned to his son Claude. Once again, these intra-family transfers and personal expenditures took place while Monaco and other Evangelista entities owed the IRS over $1 million in past-due trust funds for which Evangelista, Sr. (at least) was personally liable.

The Evangelistas' defense was grounded almost entirely on the testimony of their long-time accountant, Martin Reffsin, who was their sole witness at trial. Reff-

sin testified about the organization of the Evangelistas' businesses and explained the financial difficulties that they encountered in the late 1980s and early 1990s. Reffsin also described his negotiations with the IRS on behalf of the Evangelistas, including his various unsuccessful efforts to work out an acceptable payment arrangement between the parties. The apparent thrust of the defense was to show that the Evangelistas and their family businesses had suffered financial hardship, and had endeavored—in good faith, and with assistance and advice from accounting professionals—to resolve those problems as best they could.

Nevertheless, Reffsin's testimony also makes clear that he consistently advised the Evangelistas (a) that they were personally liable for the outstanding trust funds and obligated to pay them; (b) that they had no right to use the trust funds for any purpose other than paying the IRS; and (c) that they should enter into an agreement with the IRS to begin at least partial payment of the funds. Most important, Reffsin never told Evangelista, Sr. *not* to pay the trust funds that were owed, nor did he advise that payment could be put off or deferred pending negotiation of a formal payment arrangement.

The jury found both Evangelistas guilty on all of the counts with which they were charged.

DISCUSSION

We discuss separately each of the Evangelistas' four claims of error, turning last to the proper standard for conviction under 26 U.S.C. § 7202.

A. *Failure to Instruct on the Theories of Defense.*

The Evangelistas argue that the district court erroneously refused to instruct the jury as to their four theories of defense, each of which (they contend) had an ample basis in the evidence: (i) that they did not willfully fail to pay the outstanding trust funds, but defaulted on the payments only because adverse financial circumstances left them unable to pay; (ii) that they did not intend to *evade* or *defeat* payment of the funds, but only to *defer* payment until their financial condition improved; (iii) that they relied on the advice of their accountant, Reffsin, that it would be permissible to defer the trust fund payments—in order to continue operating their businesses and paying their other obligations—while the parties worked out a formal payment agreement; and (iv) that they did not subjectively believe that their conduct in failing to pay the funds was unlawful. All of these theories are rooted in the well-established principle that convictions for tax offenses require proof of specific intent, *i.e.*, that the defendant violated the tax laws "willfully."

This Court has "repeatedly recognized a criminal defendant's right to a charge which reflects the defense theory." *United States v. Durham*, 825 F.2d 716, 718 (2d Cir. 1987). This rule holds as to any theory "for which there is some foundation in the proof, no matter how tenuous that defense may appear to the trial court." *United States v. Vazquez*, 113 F.3d 383, 386 (2d Cir. 1997) (quoting *United States v. Dove*, 916 F.2d 41, 47 (2d Cir. 1990)). Still, defendants are "not necessarily entitled to have the exact language of the charge they submitted to the district court read to the jury." *Durham*, 825 F.2d at 719. Indeed, defendants are entitled only "to have instructions presented which adequately apprise[ ] the

jury of the elements of the crime charged and their defense"—assuming of course that "their defense theory did have a basis in law and in the evidence." *Id.*

The district court refused to issue any of the specific instructions that the Evangelistas requested in respect of their theories of defense,[4] and instead issued a general "willfulness" instruction:

> I used two words a lot, willfully and knowingly. I'm now going to define them. An act is done willfully if it is done voluntarily and intentionally with intent to do something which the law forbids. That is to say, with purpose either to disobey or to disregard the law. An act is not done knowingly and willfully, if it is done as a result of some innocent or legitimate reason, or for some other purpose than to defeat the collection and payment of withholding, payroll and income taxes.

As the Supreme Court said in *United States v. Pomponio*, 429 U.S. 10, 13 (1976) (per curiam), such a charge, in a tax case, "adequately instruct[s] the jury on willfulness." *Pomponio* expressly approved an almost identical instruction that defined a willful act "as one done 'voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say with [the] bad purpose either to disobey or to disregard the law.' " *Id.* at 11 (alteration in original).

In the factual setting of this case, we conclude that the Evangelistas were not entitled to *additional* instructions

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[4] The Evangelistas requested instructions as to, *inter alia*, the "specific intent" requirement in tax-offense cases; the "good-faith belief" defense; the implications of a defendant's "inability to pay" his taxes due to financial constraints; and the "defense of reliance on advice."

corresponding specifically to their proffered theories of defense. Our reasons are as follows.

1. *Reliance-on-Advice Theories*

All of the Evangelistas' defense theories are premised upon their good-faith reliance on Reffsin's advice that they could lawfully defer paying the trust funds—that is, cease making payments altogether—while they worked out a formal arrangement with the IRS; but such reliance-on-advice defenses lack any basis in the evidence. The Evangelistas assert that "Reffsin expressly testified that he advised Evangelista that he could defer the payment of taxes in order to keep his businesses going until such time as a payment schedule could be agreed upon with the [IRS]." Appellant's Brief at 22. The record is clear, however, that Reffsin never advised the Evangelistas that withholding payment, pending negotiation of a payment agreement, was legally permissible. Reffsin's testimony reflects that he gave precisely the opposite advice, and that the Evangelistas simply failed to follow it:

> Q: Did you ever tell Mr. Evangelista *not* to pay his payroll taxes?
>
> A: No.
>
> Q: What did you tell him?
>
> A: I told him that *he should start paying something*, at least if he can't pay it all, *pay something*.
>
> Q: Did you tell him that he could pay it over a period of time?
>
> A: I told him that we can *probably make an arrangement* with the [IRS] to pay it over a period of time.

(Emphasis added.) Reffsin reiterated this testimony when he was again asked whether he had "advise[d] Mr. Evangelista that he could pay these [trust fund] taxes over a period of time."

> A: Yes. I advised him that generally the [IRS] *would permit* him to pay it out over a period of time.
>
> Q: And you did advise him [of] that, *at the time* that these *taxes were due*?
>
> A: *Yes*.

(Emphasis added.)

Reliance on advice, offered as a defense, "presupposes the defendant's solicitation of advice in good faith." *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1194 (2d Cir. 1989) ("advice-of-counsel" defense) (citing *Williamson v. United States*, 207 U.S. 425, 453 (1908)). Moreover, the Supreme Court has placed its imprimatur on the following instruction as "the most favorable to the defendant that may be given" in a case defended on that ground:

> [I]f a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do . . . , and fully and honestly lays all the facts before his counsel, and *in good faith and honestly follows such advice*, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he could not be convicted of crime [sic] which involves willful and unlawful intent . . . .

Id. at 1194-95 (quoting *Williamson*, 207 U.S. at 453) (emphasis added). The Evangelistas were not entitled to such an instruction here, regardless of their good faith in *seeking* Reffsin's advice, because it cannot be argued

on this record that they "in good faith and honestly *follow[ed]*" the advice that Reffsin gave.

Reffsin's testimony was unequivocal: there is no mention whatever of "deferring" payment during negotiation of a payment agreement; and nothing in the record suggests that Reffsin advised the Evangelistas that the possibility of structuring such an agreement relieved them of their current and pressing obligation to pay. To the contrary, the Evangelistas were told to "start paying"—forthwith—"at least . . . something" of what they owed the IRS, and in addition to "make an arrangement" whereby the full amount of the funds could eventually be paid "over a period of time." But the Evangelistas never negotiated a formal payment "arrangement" with the IRS, at least in part because they refused to meet the conditions for such an arrangement; they never made partial payments under an informal plan (with the exception of a very few, small payments made early on); and they never came close to paying the full amount of trust funds that were owed to the IRS.

In short, the Evangelistas did not follow Reffsin's advice. Thus there was no basis in the evidence for the Evangelistas' reliance-on-advice defense, and they were not as a matter of law entitled to an instruction specifically apprising the jury of that theory.[5] Because, as we conclude, the Evangelistas' other defense theories also presuppose their reliance on Reffsin's advice, the district

[5] Even to the extent that Reffsin's advice could be construed to suggest that indefinite deferral of payment was permissible (a dubious proposition), we think that the district court's general willfulness instruction was sufficient to apprise the jury of the Evangelistas' reliance-on-advice theory. *See United States v. Kelley*, 864 F.2d 569, 573 (7th Cir. 1989) (affirming conviction for willfully filing false tax return because district court's "instructions on willfulness necessarily encompassed [the defendant's] theory of good faith reliance on counsel's advice").

court's refusal to instruct on those specific theories was correct as well.

2. *Subjective Belief of Compliance with the Code*

The Evangelistas nevertheless argue that under *Cheek v. United States*, 498 U.S. 192 (1991), the district court was required to instruct the jury as to the Evangelistas' alleged "good faith belief that [their] conduct did not violate the [IRS] laws." Appellant's Brief at 24. We have previously explained that *Cheek* "made clear that a trial court may not instruct a jury that, to negate the knowledge component of the willfulness requirement, a defendant's good faith belief that the tax laws did not impose any duty on him must be objectively reasonable." *United States v. Pabisz*, 936 F.2d 80, 83 (2d Cir. 1991); *see also Cheek*, 498 U.S. at 203 (rejecting the lower court's "requirement that a claimed good-faith belief must be objectively reasonable if it is to be considered as possibly negating the Government's evidence purporting to show a defendant's awareness of the legal duty at issue").

On the basis of *Cheek*, the Evangelistas sought an instruction stating in part:

> If, in good faith a defendant truly believed that he could pay other debts and conduct transactions, while deferring payment to the IRS, then such defendant cannot be guilty of tax evasion. The defendant's good faith belief need not be objectively reasonable for you to find the defendant not guilty of tax evasion. . . . If you find that a defendant truly believed, in good faith, that his conduct did not violate [IRS] laws, then such defendant did not have the requisite intent to be convicted of the

> tax offenses charged and you must find that defendant not guilty.

We conclude that in the circumstances of this case, the district court committed no error in refusing to give that instruction.

The Evangelistas' defense of good faith—whether objectively reasonable or not—is wholly based (once again) on the advice of their accountant Reffsin. They argue, for example, that "Evangelista[, Sr.] subjectively believed, in reliance upon the fact that he was acting with the knowledge and approval of his accountant, that he was not committing criminal violations of the tax laws." Appellant's Brief at 23. But Reffsin's advice was to the contrary. Although he advised that the IRS might be persuaded in negotiations to accept an arrangement under which the trust fund payments could be stretched out over time or reduced, the critical and unambiguous premise of that advice is that nonpayment of the trust funds was inconsistent with the Evangelistas' legal obligations under the tax code.

Thus the record supports at most that the Evangelistas in good faith believed that they could *negotiate for a dispensation from criminal prosecution*; that is not at all the same as a good-faith belief that their conduct was lawful. The Evangelistas' invocation of *Cheek* was therefore misplaced, and they were not entitled to a good-faith instruction on this record.[6] *Cf. Pomponio*, 429

[6] For similar reasons, the Evangelistas' reliance on our decisions in *Pabisz* and *United States v. Regan*, 937 F.2d 823 (2d Cir. 1991), is also flawed. In *Pabisz*, the district court's good-faith instruction—stating that the jury should consider whether "the defendant [was] *reasonable* in having a good faith belief that the income tax law did not apply to him," 936 F.2d at 82 (emphasis added)—directly contradicted *Cheek*'s mandate that a defendant's subjective belief *not* be gauged according to its "objective[ ] reasonable[ness]." *Cheek*, 498 U.S. at 202. In *Regan*, we held that

U.S. at 13 (after the trial judge "adequately instructed the jury on willfulness[,] . . . [a]n additional instruction on good faith was unnecessary").

3. *Financial Condition*

We likewise reject the Evangelistas' argument that they were entitled to an instruction stating that they could not be found guilty of willfully failing to pay the trust funds unless the government proved that they had "sufficient funds to be able to meet [their] legal obligation[s]." They cite *United States v. Poll*, 521 F.2d 329 (9th Cir. 1975), in support of their claim; but under that case, the government, in order to establish willfulness, must prove

> that at the time payment was due the taxpayer possessed sufficient funds to enable him to meet his obligation *or that the lack of sufficient funds on such date was created by (or was the result of) a voluntary and intentional act without justification in view of all the financial circumstances of the taxpayer.*

Id. at 333 (emphasis added). The instruction was properly denied in these circumstances, where despite the Evangelistas' claim that financial hardships prevented them from making trust fund payments, they nevertheless found sufficient resources to "voluntar[ily] and intentional[ly]" make mortgage payments on multiple

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a general good-faith charge "was insufficient to instruct the jury concerning appellants' specific good faith defense" in the circumstances of *that* complex case, "where appellants were charged with sixty-four counts covering the waterfront of tax fraud, securities fraud, mail and wire fraud, conspiracy, and RICO." 937 F.2d at 826-27. *Regan* does not control this case, where the Evangelistas simply defaulted on a direct and unambiguous obligation to pay $1.5 million in payroll taxes.

personal residences, pay for their children's weddings and college tuitions, and lease a luxury automobile.

B. *Applicable Statute of Limitations for 26 U.S.C. § 7202.*

The Evangelistas argue that the statute of limitations for offenses under 26 U.S.C. § 7202 is three years, rather than the six-year period of limitations applied by the district court. (Under the shorter period, most of the § 7202 charges are untimely.) Without setting forth the particulars of that argument—which is based on the general three-year limitations provision for prosecution of tax offenses, 26 U.S.C. § 6531—it is enough to say that this Court addressed the identical claim in *United States v. Musacchia*, 900 F.2d 493, 500 (2d Cir. 1990), and unequivocally "conclude[d] that a six-year statute of limitations applies to the offense defined by 26 U.S.C. § 7202." The Evangelistas "respectfully submit that the panel decision in *Musacchia* [was] in error," Appellant's Brief at 42, but they make the same legal arguments and cite the same cases that this Court carefully considered in 1990, and rejected. *See Musacchia*, 900 F.2d at 500 (finding unpersuasive the reasoning of *United States v. Block*, 497 F. Supp. 629 (N.D. Ga.), *aff'd*, 660 F.2d 1086 (5th Cir. 1980), cited in Appellant's Brief at 42-43).

As the Evangelistas point out, *Musacchia* was vacated in relevant part, *see* 955 F.2d 3, 4 (2d Cir. 1991), because the government—"after further study and consultation with the [IRS]"—became "convinced that § 7202 d[id] not apply to the gasoline taxes at issue" in that case, and therefore moved to vacate those convictions "in the interest of justice." *Id.* To the extent that the statute-of-limitations question remains open in this Circuit, we hereby reaffirm the holding of the original

Musacchia opinion that "a six-year statute of limitations applies to the offense defined by 26 U.S.C. § 7202." 900 F.2d at 500. *See also United States v. Gollapudi*, 947 F. Supp. 763, 766 (D.N.J. 1996) (finding "the Second Circuit's reasoning in *Musacchia* to be more persuasive than the district court's reasoning in *Block*").

C. *Improper Prosecutor's Comment.*

During the government's cross-examination of Reffsin, Evangelista, Sr. audibly answered "yes" in response to the prosecutor's pending question. The prosecutor reacted by saying: "I call Louis Evangelista to the stand." Judge Wexler immediately told the prosecutor to sit down, and admonished Evangelista, Sr. to "keep [his] mouth quiet." Then, at defense counsel's request, Judge Wexler convened a side-bar with all counsel, and promptly thereafter instructed the jury: "A statement was made by the defendant and a statement was made by the prosecution. Disregard them both. I think that it was in the heat of excitement where it came out, it should not have come out. They were both wrong. So disregard it." The defense made no contemporaneous objection to the court's curative instruction.

The Evangelistas claim that this "egregious act of prosecutorial misconduct . . . . amounted to a deliberate effort to undermine [their] constitutional rights" not to testify, and was "in no way cured by the District Court's instruction" to the jury. Appellant's Brief at 40.[7]

This Court has stated that "[i]nappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction

[7] Claude Evangelista makes no separate or additional argument regarding any possible independent prejudice to his case stemming from this incident.

obtained in an otherwise fair proceeding[;] . . . such remarks must be examined within the context of the trial to determine whether the prosecutor's behavior amounted to prejudicial error." *United States v. Friedman*, 909 F.2d 705, 709 (2d Cir. 1990) (quoting *United States v. Young*, 470 U.S. 1, 11-12 (1985)) (internal quotations omitted). "In making this assessment, this Court has focussed primarily on three factors: the severity of the misconduct, the measures adopted to cure it, and the certainty of conviction in the absence of the misconduct." *United States v. Melendez*, 57 F.3d 238, 241 (2d Cir. 1995).

Under this standard, the prosecutor's comment—while plainly improper—does not warrant reversal. We agree with the government that the comment ultimately had no prejudicial effect on Evangelista, Sr., or on his son Claude, when considered in light of the district court's immediate curative instruction and the weight of evidence against both defendants.

The severity of the prosecutor's single improper statement was also "mitigated somewhat in this case because the remark appears to have been an aberration in an otherwise fair proceeding." *Id.* "[M]ost of the cases in which we have reversed convictions as a result of prosecutorial misconduct have involved repeated improper statements whose aggregate effect was more likely to undermine the fairness of the trial." *Id.* The prosecutor's statement here had no bearing on the credibility of the defense witness on the stand at the time, or on the validity of the evidence against the Evangelistas. We emphasize that there is no one-free-bite rule for prosecutors, but the record reflects and supports Judge Wexler's view that the comment was a heated, momentary response to provocation rather than a tactical move. In short, the

prosecutor's comment is an insufficient ground for reversal.

D. *Proof Required for Conviction Under § 7202.*

As indicated at the outset, we write chiefly to address a question of statutory interpretation regarding the requirements for conviction under § 7202. That statute, entitled "Wiliful failure to collect or pay over tax," provides in relevant part: "Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall . . . be guilty of a felony . . . ." 26 U.S.C. § 7202.

The Evangelistas argue that § 7202 defines two offenses, expressed schematically as follows:

> [1] the willful failure to collect trust fund taxes, and
>
> [2] the willful failure to—
>
> > [a] truthfully account for, and
> >
> > [b] pay over such taxes.

According to the Evangelistas, the second of these offenses—the only one at issue here—requires proof of two discrete elements: *both* a willful failure to "truthfully account for" trust funds, *and* a willful failure to "pay over" those funds. Appellant's Brief at 36 (quoting 26 U.S.C. § 7202). The Evangelistas argue that because they consistently *filed* the required Forms 941 tax returns—as the government apparently concedes—they *did* "truthfully account for" the trust funds that they owed; and therefore the government failed as a matter of law to prove both elements of the crime under § 7202.

The government counters that under "[a] fair reading of the statute and the legislative history" of § 7202, "Congress intended that an employer . . . perform all three duties, namely, (1) collection of trust fund taxes, (2) truthful accounting for trust fund taxes and (3) paying over to the government trust fund taxes." Appellee's Brief at 33. In the government's view, the "account for and pay over" provision of § 7202—even assuming that the statute defines two separate offenses—is therefore violated by the willful failure to perform *either* the duty to account or the duty to pay.

These competing interpretations of § 7202 raise a question of first impression in this Circuit. We agree with the government that the plain language of the disputed passage in § 7202 creates a dual obligation—to "truthfully account for and pay over" trust fund taxes—that is satisfied only by fulfilling *both* separate requirements. Accordingly, the command of the statute is violated by one "who willfully fails" *either* to "account for" *or* to "pay over" the necessary funds.

We find support for our view in one of the few published decisions to consider this issue. The argument raised here by the Evangelistas was also presented in *United States v. Brennick*, 908 F. Supp. 1004 (D. Mass. 1995), and was rejected in persuasive terms by that court. Preliminarily, the *Brennick* court read § 7202 much the same as we do: "The phrase 'truthfully account for and pay over' is . . . unambiguously conjunctive. Somebody who was required to 'truthfully account for and pay over' a tax would be required to do both things to satisfy the requirement"; therefore, "any intentional failure to complete the required task (to truthfully account for and pay over the tax) constitutes a crime." *Id.* at 1016.

We agree as well with the *Brennick* court's conclusion that:

> the only plausible reading of the plain language of the statute penalizes the failure to complete the duty imposed by law: truthfully accounting for and paying over the withholding tax collected by an employer. The alternative reading is inconsistent with any reasonable understanding of the purposes of the statute. It would result in a greater penalty for one who simply failed to collect trust fund taxes than for one who collect[ed] them and, as is charged here, used them for his own selfish purposes . . . , so long as he notified the IRS that he had collected the tax. That Congress intended to make such a distinction is simply inconceivable.

Id. at 1017.

In arguing the contrary position, the Evangelistas rely on two opinions by panels of the Ninth Circuit, *United States v. Poll*, 521 F.2d 329 (9th Cir. 1975) (following *Wilson v. United States*, 250 F.2d 312 (9th Cir. 1958)). We are aware of no other authority that even remotely supports the Evangelistas' interpretation of § 7202. The Ninth Circuit in *Poll* stated, in the last line of a long footnote appended to the last sentence of the opinion, "We continue to regard the crime [under § 7202] as requiring two failures to act, willful failure to truthfully account *and* willful failure to pay over." *See* 521 F.2d at 335 n.3 (emphasis in original). As *Brennick* points out, this statement is dicta. *See Brennick*, 908 F. Supp. at 1015. *Poll* was not concerned with whether proof of two elements (failure to "account for and pay over") was required; the only issues in *Poll* were how to define "willfulness" under § 7202, and what evidence could be

adduced to show it. *See, e.g., Poll*, 521 F.2d at 331. The most that can be said is that *Poll* (and *Wilson*) assume without analysis that § 7202 (and its predecessor statute in *Wilson*) require both a willful failure to account for and a willful failure to pay over.

The Evangelistas' final argument is based on a comparison between § 7202 and 26 U.S.C. §§ 7215 and 7512. Section 7215 provides that it is a *misdemeanor* to fail to comply with § 7512, which in turn penalizes anyone who "fails to collect, truthfully account for, *or* pay over such tax." 26 U.S.C. § 7512(a)(1). The Evangelistas argue that the use of the disjunctive ("or") in § 7512, violation of which is punished as a misdemeanor, demonstrates that Congress used the conjunctive ("and") in § 7202 for the purpose of adding an element to an offense that is punished as a felony. No such labored analysis is needed to account for the distinction in penalty, which can be attributed to the fact that the felony offense under § 7202 entails the element of "willfull[ness]," while the misdemeanor under §§ 7215 and 7512 does not.

In sum, we hold that the government satisfies the requirements for conviction under § 7202 when it proves beyond a reasonable doubt that the defendant willfully failed *either* to "truthfully account for" *or* to "pay over" the required trust fund taxes.[8]

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[8] We note that the district court in fact charged the jury in accordance with the standard that we expressly adopt here. Judge Wexler stated (in relevant part) that in order for the jury to find that the Evangelistas had violated § 7202, the government had to prove beyond a reasonable doubt that "the defendant[s] failed to comply with [the statutory] duty by failing to truthfully account for and pay over the Federal taxes in that, *although having truthfully accounted for* [the] Federal taxes described in the indictment . . . , [they] *failed to pay over* such Federal taxes." (Emphasis added.)

CONCLUSION

We have considered all of the Evangelistas' arguments challenging their convictions, and find them to be without merit. The judgments of conviction for both Louis Evangelista, Sr. and Claude Evangelista are therefore affirmed.

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF NEW YORK

Case Number: CR 94-1277(S-2)

UNITED STATES OF AMERICA

—v.—

CLAUDE EVANGELISTA,

Defendant.

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

PAUL GIANELLI, Esq (Ret.)
200 Motor Parkway, POB 1117
Hauppauge, New York 11788
Defendant's Attorney & Address

THE DEFENDANT was found guilty on counts 1, 18-25 of a 26 count superseding indictment(S-2) after a plea of not guilty on February 28, 1996.

Accordingly, the defendants is ADJUDGED guilty of such count(s), which involve the following offenses:

TITLE & SECTION	NATURE & OFFENSE	COUNT NUMBER(S)
18 USC 371	Conspiracy to Impede the IRS in collection of Income and payroll taxes	1 (5/95)
26 USC 7202	Failure to collect pay Income/FICA Taxes	18-259(12/93)

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

XXX All outstanding counts on Underlying and Superseding Indictments are dismissed on the motion of the United States—Peter Tomao, AUSA.

XXX It is ORDERED that the defendant shall pay to the United States a special assessment of $450.00 which shall be due immediately.

It is further ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessment imposed by this Judgment are fully paid.

Defendant's Soc. Sec # 122-66-8755

Defendant's Date of Birth April 22, 1963

Defendant's Address:

20 Underhill Road

Locust Valley, New York 11560

October 28, 1996
Date of Imposition of Sentence

/s/ LEONARD D. WEXLER
LEONARD D. WEXLER, U.S.D.J.

October 29, 1996
Date

A TRUE COPY ATTEST
Dated: October 29, 1996
ROBERT C. HEINEMANN
Clerk of Court

By: /s/ JOSIAH KHARJIE
JOSIAH KHARJIE
Courtroom Deputy

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of FORTY-SIX (46) months on each of Counts 1, and 18-25 of the Superseding Indictment (S-2), to run concurrently

___ The Court makes the following recommendation to the Bureau of Prisons:

___ The defendant is remanded to the custody of the United States Marshal.

___ The defendant shall surrender to the United States Marshal for this district,

___ at _____ on _____

___ as modified by the Marshal.

XXX The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

XX before 2:00 P.M. on January 4, 1997

XX as notified by the United States Marshal or

XX as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

DEPUTY MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS on each of Counts 1, and 18-25 of the Superseding Indictment (s-2), to run concurrently.

Special condition[s] of supervised release:

a. Defendant to cooperate with IRS assessment and payment of taxes owed.

b. Defendant to make full financial disclosure as directed by the Probation Department.

_X_ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) The defendant shall not leave the judicial district without the permission of the court or probation officer;

3) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) The defendant shall support his or dependents and meet other family responsibilities;

6) The defendant shall work regularly at lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotics or other controlled substance, or any paraphernalia related to said substances, except as prescribed by a physician;

9) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

10) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) The defendant shall notify the probation officer within seventy-two hours of being arrested questioned by a law enforcement officer;

13) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

UNITED STATES COURT OF APPEALS
EASTERN DISTRICT OF NEW YORK

Case Number: CR 94-1277(S-2)

UNITED STATES OF AMERICA

—v.—

LOUIS EVANGELISTA, SR.,

Defendant.

JUDGMENT INCLUDING SENTENCE
UNDER THE SENTENCING REFORM ACT

ROBERT FINK, Esq (Ret.)
230 Park Avenue
New York, New York 10169
Defendant's Attorney & Address

THE DEFENDANT was found guilty on counts 1, 2-17, 21-25, & 26 of a 26 count superseding indictment(S-2) after a plea of not guilty on February 28, 1996.

Accordingly, the defendants is ADJUDGED guilty of such count(s), which involve the following offenses:

TITLE & SECTION	NATURE & OFFENSE	COUNT NUMBER(S)
18 USC 371	Conspiracy to Impede the IRS in collection of Income and payroll taxes	1 (5/95)
26 USC 7202	Failure to collect pay Income/FICA Taxes	2-17, 21-25 (12/93)
26 USC 7201	Attempt to evade or defeat tax	26 (6/14/91)

The defendant is sentenced as provided in pages 2 through 3 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

XXX All outstanding counts on Underlying and Superseding Indictments are dismissed on the motion of the United States—Peter Tomao, AUSA.

XXX It is ORDERED that the defendant shall pay to the United States a special assessment of $1,150.00 which shall be due immediately.

It is further ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessment imposed by this Judgment are fully paid.

Defendant's Soc. Sec # 073-36-1191

Defendant's Date of Birth December 24, 1940

Defendant's Address:

20 Underhill Road

Locust Valley, New York 11560

October 28, 1996
Date of Imposition of Sentence

/s/ LEONARD D. WEXLER
LEONARD D. WEXLER, U.S.D.J.

October 29, 1996
Date

A TRUE COPY ATTEST
Dated: October 29, 1996
ROBERT C. HEINEMANN
Clerk of Court

By: /s/ JOSIAH KHARJIE
JOSIAH KHARJIE
Courtroom Deputy

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of Fifty-one (51) months on each of Counts 1, 2-17, 21-25, and 26 of the Superseding Indictment (S-2), to run concurrently

___ The Court makes the following recommendation to the Bureau of Prisons:

___ The defendant is remanded to the custody of the United States Marshal.

___ The defendant shall surrender to the United States Marshal for this district,

___ at _____ on _____

___ as modified by the Marshal.

XXX The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

XX before 2:00 P.M. on January 4, 1997

XX as notified by the United States Marshal or

XX as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By _____

DEPUTY MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of THREE (3) YEARS on each of Counts 1, 2-17, 21-25 & 26 of the Superseding Indictment (S-2), to run concurrently.

Special condition[s] of supervised release:

a. Defendant to cooperate with IRS assessment and payment of taxes owed.

b. Defendant to make full financial disclosure as directed by the Probation Department.

_X_ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state or local crime;

2) The defendant shall not leave the judicial district without the permission of the court or probation officer;

3) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) The defendant shall support his or dependents and meet other family responsibilities;

6) The defendant shall work regularly at lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotics or other controlled substance, or any paraphernalia related to said substances, except as prescribed by a physician;

9) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

10) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) The defendant shall notify the probation officer within seventy-two hours of being arrested questioned by a law enforcement officer;

13) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Filed September 25, 1997

Docket No. 96-1712

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-fifth day of September, one thousand nine hundred and ninety-seven.

USA

—v—

EVANGELISTA

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellants Louis Evangelista, Sr. and Claude Evangelista.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: BETH J. MEADOR
Beth J. Meador,
Administrative Attorney